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**BEFORE THE**  
**STATE OF WISCONSIN**  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Alleged Discharge of	)	
a Hazardous Substance on Property Located at	)	Case No. IH-95-17
10227, Hwy. 80 in the Town of Rockbridge,	)	
Richland County, Wisconsin	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Pursuant to due notice hearing was held on January 30, 1996 at Richland Center, Wisconsin, Jeffrey D. Boldt, the Administrative Law Judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Arthur and Veronica Simpson  
Route 3, Box 219  
Richland Center, Wisconsin 53581-0219

Wisconsin Department of Natural Resources, by

Attorney Joseph Renville  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

**FINDINGS OF FACT**

1. Arthur and Veronica Simpson (the respondents) own property located at 10227, Highway 80, in the northeast quarter of the northwest quarter of Section 10, Township 11 North, Range 1 East, in the Township of Rockbridge, Richland County, Wisconsin. The Respondents have owned the subject property since May of 1964.

2. The Respondents formerly owned and operated Simpson Auto Body at the site. Two underground storage tanks (UST'S) were installed for the sale of gasoline at this site prior to 1971. The Simpson's made gasoline sales at the site during the period from 1964 to 1978. In 1971 one of the original tanks was removed and two additional gasoline underground storage tanks were installed. All three of the storage tanks were removed on or about April 16, 1991. (Ex.26) There is no real dispute that the underground storage tanks

were owned by the Broadbent Oil Company (Broadbent) at the time of removal.(Ex. 25) The tanks were removed by Broadbent. There is also no factual dispute that Broadbent never sold gasoline product to the Respondents, but was instead the successor to the prior oil company, Krouskop's, which delivered gasoline to the site.

3. The Wisconsin Department of Transportation (DOT) became aware of possible contamination at the site in connection with a roadway project through the Town of Rockbridge. The site is on the above-described property owned by the Simpsons in an area in which the DOT has a right of way. At the request of the DOT, soil borings were undertaken on the subject property on or about August 15, 1991. Because these borings indicated contamination near the existing one story wood frame garage structure which was the site of the former auto body business and gas pump, the matter was reported to the DNR. A second round borings were made December 2, 1991. A third round of soil borings was undertaken February 5, 1992. There were some significant differences in the results of the various rounds of soil samplings.

4. The Department of Natural Resources sent the Simpsons a so-called "responsible party letter" on September 9, 1992.

5. On January 7, 1994 the Department issued a Notice of Noncompliance to the Simpsons for refusing to initiate an investigation.

6. On April 27, 1994 the Department issued a Notice of Violation to the Respondents indicating that the Simpsons had failed to indicate their intent to proceed. The Notice of Violation gave the Simpsons 30 days to notify the Department that they had hired an environmental consultant and 60 days for the consultant to commence investigative work.

7. On September 21, 1994 the Department sent another letter requesting the Simpsons reply within 15 days indicating their intention for conducting an investigation. On June 20, 1995 the Department issued Order No. 95-SDEE-011 which is the subject of this contested case hearing.

8. The respondents have not complied with the Order as issued. No work or action plan has been submitted to the Department as provided for in the Order.

9. The respondents dispute the accuracy of the various test borings based upon apparent lack of consistent results.(Ex. 27) Specifically, the respondents correctly assert that the second round of borings conducted on December 6, 1991, did not reveal any contamination at boring sites #2 and #3. DNR ERF Unit Leader Patrick McCutcheon

confirmed that these results did not demonstrate contamination. However, McCutcheon testified that these borings were not placed at the best location for determining whether the first boring results suggesting contamination were accurate. Instead of following the usual protocol of trying to duplicate the first boring conditions, both of these samples were placed north of the first boring site. Further, McCutcheon testified that one of the two borings undertaken on December 6, 1991 should have been down-gradient of the initial boring. Defects in the placement of boring sites #2 and # 3 led to another round of borings on the site on February 5, 1992. This time boring #4 was placed down-gradient of the original site and boring # 5 was made within one foot of the original August 15, 1991 site.

The results of these tests are summarized in the Environmental Site Assessment Report (the Report) prepared for DOT, which was subsequently forwarded to the DNR. The report indicated that soils and groundwater at the location of Boring No. 5 were contaminated with petroleum products. Test results indicted that soil contamination exceeded DNR cleanup guidelines and that groundwater contamination exceeded both DNR enforcement standards and Preventive Action limits set forth in sec. NR 140, Wis Admin. Code. The Report recommended that further studies be conducted to determine the extent of contamination at the former Simpson Auto Body site.

McCutcheon reviewed and analyzed test results and provided expert testimony indicating that the conclusions of the report were accurate. However, the respondents presented no expert testimony that disputes the expert opinion of McCutcheon that the site is still contaminated. A clear preponderance of the credible evidence, including all of the expert testimony, demonstrates that there is a strong likelihood that there is still contamination at the site which needs to be investigated and clearly defined.

10. On May 25, 1994 representatives of the Department of Natural Resources met with the Respondents, personnel from the Wisconsin Department of Transportation and the Richland County Highway Agency to discuss the situation. During the meeting the Department indicated that they would make an effort for the Department of Transportation to undertake a new round of soil samplings which all parties would agree was definitive. The Simpsons refused this offer, preferring to proceed to hearing.

11. The Simpsons argue that they did not cause or possess or control a hazardous substance within the meaning of sec. 144.76(3). The respondents cite a number of WDNR and USEPA publications which strongly suggest that liability for hazardous substance spills rests principally with UST owners. (Exs. 19-20) There is no question that there is some intuitive appeal to their argument in this regard. However, Wisconsin law is clear that the owner of contaminated lands is liable under sec. 144.76(3), Stats.

The Wisconsin Supreme Court directly addressed this issue in the case of State v. Mauthe, 123 Wis. 2d 288, 300-301, 366 N.W.2d 871 (1985).

The Court ruled as follows:

" . . . the remaining issue is whether the owner of the land containing that soil is responsible under sec. 144.76(3), to take remedial action. Responsibility under sec. 144.76(3), falls upon a "person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance." The circuit court and the court of appeals agreed with Mr. Mauthe's contention that mere ownership of the property in which the contaminated soil is located is not sufficient to impose liability under sec. 144.76(3). We disagree. A basic rule of statutory construction is that "meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." Kollasch v Adamany, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1918). Giving meaning to every word and clause in sec. 144.76(3), Stats., it is apparent that liability may be imposed upon anyone who causes a hazardous substance discharge or upon a person who possesses or controls the hazardous substance being discharged even though that person did not cause the discharge.

The common and ordinary meaning of a word may be established from the definition given by a recognized dictionary. In re Estate of Haese, 80 Wis. 2d 285, 291, 259 N.W.2d 54 (1977). "Possess" is defined in Black's Law Dictionary, 1046 (5th ed. 1979) as follows:

"POSSESS. To occupy in person; to have in one's actual and physical control; to have the exclusive detention and control of; to have an Hold as property; to have a Just right to; to be master of; to own or be entitled to."

Under this definition, Mr. Mauthe, individually and d/b/a N.W. Mauthe Company, does possess the contaminated soil and the chromium which is contaminating that soil. He has "actual and physical control" of the chromium and he "owns" and has "exclusive

... control of" the contaminated soil. As landowner, he is the only person, absent legal intervention, entitled to take the type of remedial action necessary. He is the only person entitled to excavate, to remove the contaminated soil or to construct an impermeable barrier around the soil to prevent further discharge."

The Wisconsin Supreme Court case is binding on the ALJ, and the respondent's argument is accordingly rejected. The petitioners also raise the argument that this same logic should apply to make the state DOT a responsible party because they may control the right of way along the state highway. This issue is outside the scope of this proceeding, which relates solely to the Order issued to the Simpsons. The Wisconsin DOT has not been a party to this proceeding. Accordingly, the ALJ does not reach the issue of any liability of the DOT.

### DISCUSSION

There is every indication that the Simpsons ran their prior business in a responsible manner according to industry practice at the time the UST's were placed on their property. Their principal motivation in having gas pumps located on their property appears to have been to make gasoline more readily available to rural patrons. There is no question that the Simpsons are impressive, hardworking people who find themselves in their current predicament through no fault of their own. While the ALJ might sympathize with the respondents plight, the current status of Wisconsin law is clear that property-owners "possess or control" hazardous substances on the lands they own. The respondents arguments in this regard must accordingly be rejected. Further, the record provided a reasonable explanation as to why the boring results appear inconsistent. The latest round of borings indicated the presence of hazardous petroleum hydrocarbon compounds including ethyl benzene, toluene and xylenes. The record provided every indication that the former UST system at the site is the source of these hazardous substances. The Department's Order must therefore be affirmed. It is hoped that the respondents can acquire financial assistance through the PECFA program.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and enter necessary orders in cases involving hazardous substance spills pursuant to sec. 227.43(3)(b) and sec. 144.76(3), Stats.
2. Petroleum products and their constituent parts are hazardous substances as defined by sec. 144.01(4)(n), Stats.

3. Under section 144.76(3), Stats., the Simpsons, as former owners and operators of the site, possessed or controlled the hazardous substances which were discharged and caused the discharge of the hazardous substances and shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge into the air, lands or waters of the state. The actions identified in the above findings and as set forth in the following Order are necessary to achieve this purpose.

4. The Order set forth below is necessary to accomplish the purposes of sec. 144.76, Stats., and Chs. NR 700 to 726, Wis. Admin. Code.

5. An owner of contaminated lands "possesses or controls" a hazardous substance discharge within the meaning of sec. 144.76(3), Stats. State v. Mauthe, 123 Wis. 2d 288, 300-301, 366 N.W.2d 871 (1985).

#### ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Division therefore orders Mr. and Mrs. Arthur Simpson to do the following:

1. Within thirty (30) calendar days after the effective date of this Order, provide the Department with the name of the qualified environmental consultant who will be conducting the investigation and remediation required by this Order.

2. Within forty-five (45) calendar days after the effective date of this Order, submit a site investigation work plan to the Department, for Department review and approval or conditional approval. The investigation work plan shall be designed to define the extent and degree of horizontal and vertical soil and groundwater contamination resulting from the discharge of petroleum products at the site. The investigation work plan shall comply with the requirements of Ch. NR 716, Wis. Admin. Code, the attached Remedial Investigation Checklist (incorporated herein as Attachment A) and all applicable federal and state laws. The investigation work plan shall include a schedule for implementing the investigation.

3. If the Department requires modifications to the site investigation work plan, modify the investigation work plan to address the Department's comments within twenty (20) calendar days after the date of the Department's notification. The Department may place conditions in the approval of the investigation work plan.

4. Within thirty (30) calendar days after the Department's approval or conditional approval of the site investigation work plan, conduct the investigation in compliance with the terms and conditions of the Department's plan approval, Ch. NR 716, Wis. Admin. Code and all applicable federal and state laws.

5. Within ninety (90) calendar days after the Department's approval or conditional approval of the site investigation work plan, submit a site investigation report to the Department of the findings of the investigation in compliance with the requirements of sec. NR 716.15, Wis. Admin. Code.

6. If the site investigation work plan approved or conditionally approved by the Department under this Order is not sufficient to fully define the degree and extent of the contamination, the site investigation report shall include a proposal for an additional site investigation work plan for Department review and approval. The additional site investigation work plan contained within the site investigation report shall be designed to complete the investigation and shall include a proposed schedule for implementing the additional site investigation work plan.

7. If the Department requires modification of the site investigation report, modify the investigation report to address the Department's comments within twenty (20) calendar days after receipt of the Department's notification. The Department may place conditions in the approval of the site investigation report.

8. If an additional site investigation work plan is required as part of the site investigation report, conduct the additional site investigation, upon approval or conditional approval of the site investigation report, and report to the Department as directed by the conditions of the site investigation report approval.

9. If no additional site investigation is required as part of the site investigation report, submit to the Department, for Department review and approval or conditional approval, a remedial action plan for remediation of soil and groundwater contamination within forty-five (45) calendar days after the Department's approval of the site investigation report. The remedial action plan shall comply with the requirements of Ch. NR 724, Wis. Admin. Code, and all applicable federal and state laws.

10. If the Department requires modification of the proposed remedial action plan, modify the remedial action plan to address the Department's comments within twenty (20) calendar days after receipt of the Department's notification. The Department may place conditions in the approval of the remedial action plan.

11. Within thirty (30) calendar days after the Department's approval or conditional approval of the remedial action plan, conduct the remedial action in compliance with the terms and conditions of the Department's approval, Ch. NR 724, Wis. Admin. Code, and all applicable federal and state laws.

12. If interim action is required by secs. NR 708.11 or 708.13, Wis. Admin. Code, select the necessary interim action and submit to the Department an interim action plan for Department review and approval prior to implementation of the interim action. The interim action plan shall include a schedule for implementing the interim action.

13. If interim action is required under paragraph 12 of this Order, conduct the interim action according to the terms and conditions of the Department's approval and all applicable federal and state laws

14. Notify the Department, in writing, at least fifteen (15) calendar days prior to any sampling performed under any work plan required by this Order.

15. Submit written monthly progress reports to the Department by the tenth (10th) of each month following the effective date of this Order. These monthly progress reports shall:

- a. Describe the actions which have been taken toward achieving compliance with this Order during the preceding month.
- b. Include tabulated results of sampling, testing, an updated groundwater contour map, if groundwater sampling has been conducted, and all other data generated during the preceding month.
- c. The following additional information shall be submitted every third month:
  - i. Summary Tables for all historical groundwater quality and elevation data related to each well.
  - ii. Graphs of all historical groundwater chemistry data related to each monitoring well. At a minimum, these graphs shall be drawn depicting Ch. NR 140, Wis. Admin. Code, Preventive Action Limit and Enforcement Standard Exceedances for the compounds of concern.
  - iii. Evaluation of the effectiveness of the site investigation and the remedial action and recommendations for improvements.

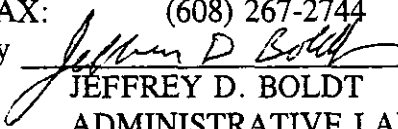
16. Mail or deliver copies of each report, plan or other submittal required by this Order to the following address:



Wisconsin Department of Natural Resources  
Southern District Headquarters  
Attn: Martin Nessman  
3911 Fish Hatchery Road  
Fitchburg, Wisconsin 53711 (Two Copies)

17. The Department reserves jurisdiction to amend this Administrative Order if such action is necessary for the protection of public health, safety or welfare. If the Department amends any provision of this Administrative Order, then Mr. and Mrs. Arthur Simpson will have the right to appeal the amended provisions.

Dated at Madison, Wisconsin on March 12, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744  
By \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.